

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN G. DAVIS,

Defendant-Appellant.

UNPUBLISHED

March 27, 2003

No. 239302

Wayne Circuit Court

LC No. 00-012648-01

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of first-degree home invasion, MCL 750.110a(2), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to ten to twenty years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The victim's living quarters were in an apartment above her antique shop. The building had two addresses and, in the front, separate doors gave entry into the shop and to the stairway to the upstairs apartment. However, a door inside the shop opened into the stairway area leading to the apartment. There was only one rear entrance into a storage area behind the antique shop.

On the day of the crime, the victim returned to her building and entered through the locked rear door. She could see defendant in the shop area, retrieved a gun and shot him twice. She then forced him upstairs at gunpoint, retrieved another weapon and called police.

On appeal, defendant argues that because he did not enter a "dwelling" the evidence was insufficient as a matter of law to support a conviction of home invasion. We disagree. Defendant's argument is essentially that he entered only the antique shop, a commercial unit of the building, which was separate from the apartment unit of the building and that the commercial unit did not constitute a "dwelling" for purposes of the statute. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Lueth*, 253 Mich App 670, 680; ___ NW2d ___ (2002).

Defendant's argument fails because while there were two outside doors and two street numbers, the apartment and the shop were joined by an inside door which connected the shop and the stairway entrance to the apartment; they were, in reality, a single unit which included a

dwelling within the meaning of the statute. Defendant claims that he entered only the shop area where the victim discovered him. Even if true, defendant had access to the apartment via the connecting door which was not locked. We conclude that a rational trier of fact viewing the evidence in a light most favorable to the prosecution could have found the elements of home invasion proved beyond a reasonable doubt.

Defendant also argues that he was denied a fair trial due to prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because this issue was not preserved by proper objection at trial, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The prosecutor questioned defendant about his use of aliases at some unspecified time in the past and then argued that his use of aliases rendered his credibility suspect despite the fact that defendant had denied using any aliases. This was improper. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). However, a prompt specific instruction could have cured the error. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). In addition, the trial court did instruct the jurors that it was their duty to determine the credibility of witnesses, that they were to decide the case based solely on the evidence, and that the lawyers' arguments were not evidence. Under the circumstances, reversal is not required. *Id.* at 382-383; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

During closing argument, the prosecutor repeatedly referred to defendant as an expert because he had testified to a vocation in collecting and selling antique "architectural appointments." We discern nothing inherently prejudicial in the use of the term expert. Even if some derogatory meaning could be inferred, the court's instructions were sufficient to dispel any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant's final argument is that he was denied the effective assistance of counsel because trial counsel failed to object to the incidents of prosecutorial misconduct. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). While it was error for counsel to fail to object to the prosecutor's references of defendant's claimed aliases, defendant has failed to show any reasonable probability that the result of the proceedings would have been different or that the proceedings were fundamentally unfair or unreliable.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage